

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10334 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
  2. To be referred to the Reporter or not? : YES
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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SADARUDDIN MAGANBHAI NARSIDANI

Versus

STATE OF GUJARAT  
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Appearance:

MR BM MANGUKIYA for Petitioner  
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CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 27/12/1999

ORAL ORDER

#. The petitioner has approached this Court with this petition under article 226 of the Constitution claiming protection under Articles 14, 19, 21 and 22 of the Constitution apprehending passing of orders of detention under the Gujarat Prevention of Anti Social Activities Act, 1985 ("PASA Act" for short).

#. The petitioner has sought the following reliefs:-

"29. On the facts and circumstances mentioned hereinabove, the petitioner prays to Your Lordships that-

(A) Be pleased to issue a writ of mandamus of in the nature of mandamus or any other appropriate writ, order or direction and restrain the respondents Nos.1 and 2 for exercising any powers under sub-section (2) of sec. 3 of the Act and ordering the preventive detention of the petitioner.

(B) Be pleased to issue a writ of mandamus or in the nature of mandamus or any other appropriate writ, order or direction and quash and set aside the order passed by the respondent No.2 issued in purported exercise of powers under sub-sec.(2) of sec.3 of the Act ordering the preventive detention of the petitioner and declare that such exercise of powers by the respondent no.2 is ex facie arbitrary and mala fide.

(C) Pending admission and final disposal of this petition, be pleased to restrain the respondents nos.1 and 2 and their officers, subordinates from arresting the petitioner for preventive detention of the petitioner ordered in purported exercise of powers under sub-sec. (2) of sec.3 of the Act.

(D) Be pleased to pass such other and further orders as may be deemed fit."

#. The petitioner has alleged that he apprehends his detention under the PASA Act by the authority concerned on account of political victimisation. He has alleged that he belongs to and believes in philosophy of a particular political party. He also claims to have been commanding respect of people belonging to his community and in view of the approaching elections of the village Panchayat, the rival political party invited him to lend support to that party, which he declined and, therefore, an attempt is made to prevent him from pursuing his political activities by detaining him under the PASA Act. It is alleged that two false cases are registered against the petitioner and he was arrested thereunder. Taking shelter of the provisions of law, he was unnecessarily detained in custody for 24 hours in each of the cases, though no investigation was done and, thereafter, on completion of 24 hours' time, was produced before the

Magisterial Court, where he has been ordered to be released on bail. The petitioner states that he is an aged man of about 68 years of age and is heavily built. He is not likely to engage himself in any activities which may be detrimental to public order and, therefore, the concerned authorities may be directed or restrained from exercising powers under Section 3 of the PASA Act.

#. Mr. B.M. Mangukia, learned advocate appearing for the petitioner has, at length, argued the matter on question of admission. He has reiterated the above grounds. He submitted that the petitioner is basically agriculturist and is respected by his caste fellows. He is an aged man with a heavy built and belongs to a particular political party, as he believes in the philosophy of that party. He has a fractured leg and he is not in a position to walk or squat. The petitioner was invited by the party in power to help in the ensuing elections of village Panchayat and Taluka Panchayat, to which he declined because of difference in philosophy. The ruling party has, therefore, made use of its powers and the petitioner, therefore, has strong threat of being detained under the provisions of the PASA Act. Two false cases, one for the offences punishable under Sections 452, 384, 506(2) and 190 of the Indian Penal Code and Section 135 of the Bombay Police Act, and another for offences punishable under Section 506(2) of the Indian Penal Code and Section 135 of the Bombay Police Act, are registered against the petitioner. The petitioner was arrested therefor, taken to Dandhuka and the petitioner was presented before the Magisterial Court at Dandhuka on the next day. No sooner he was released by the Court on bail, he was again arrested, taken in custody and presented before the Court on the next day. This is how vindictively the petitioner was kept under custody separately for 24 hours for each of the two offences, though there was no need. Mr. Mangukia, therefore, submitted that this is a clear case of political victimisation of the petitioner. He submitted further that the petitioner has been the Chairman of a co-operative society of Ranpur Group for about 25 years. Mr. Mangukia has drawn attention of this Court to xerox copy of an affidavit sworn by Dharamshibhai Mavjibhai Panchal. In that affidavit, it is stated by the deponent that the petitioner is a reputed person of Ranpur, that the deponent had sold his land to the petitioner voluntarily, which his son (the deponent's son) Valjibhai Dharmashibhai and Keshubhai Dharamshibhai did not like and, therefore, they have filed a suit against the deponent and have obtained injunction. The complaint lodged by Keshubhai Dharamshibhai against the petitioner

is false and is lodged only with a view to put the petitioner under pressure. No such incident has occurred, but the complaint is lodged upon instigation. Mr. Mangukia, therefore, submitted that the complaint is false and is outcome of political vendetta.

#. Mr. Mangukia submitted that the case of the petitioner would be covered by the decision of the Apex Court in the case of Additional Secretary to Government of India & Ors. v. Smt. Alka Subhash Gadia and Another, 1992 Supp (1) SCC 496. He submitted that pre-execution petitions can be entertained by Courts as has been held in the above case and, therefore, the petition may be entertained. He submitted that, at the most, the Court may insist for the petitioner, in such cases, to surrender first and give priority to the hearing of the petition as well as may permit the petitioner to amend the petition. He submitted that the accused of the present petitioner falls within the four corners of the principles laid down in Alka Gadia's case and, therefore, the petition may be entertained. He then relied upon the decision in the case of N.K. Bapna v. Union of India and Ors. (1992) 3 SCC 512.

5.1 Mr. Mangukia submitted that the decision in the case of Union of India and Another v. Parasmal Rampuria, (1998) 8 SCC, 402 will not be applicable to the facts of the present case as the judgment is rendered in facts of that case and the judgment does not lay down any principle contrary to the case of Alka Subhash Gadia (supra). He submitted that since the decision is given in facts of that case, it cannot be considered as a binding principle in light of the Apex Court's decision in case of State of U.P. & Another v. Synthetics and Chemicals Ltd. and Another, (1991) 4 SCC 139. He submitted that it is not a law declared as the decision does not express any principle nor it is founded on reasons or consideration of the issues. He submitted that even if it is taken to be to be so, it would have no effect for the reason that the decision in the case of Alka Subhash Gadia was rendered by a Bench of three Judges of the Apex Court whereas the subsequent decision is rendered by a Bench of two judges and the case of Alka Subhash Gadia is not considered in the second case. The decision in the case of Parasmal Rampuria will not be applicable to the present case, according to Mr. Mangukia, for the reason that even subsequent decisions of the Apex Court in the case of N.K. Bapna (supra), Administration of the National Capital of Delhi v. Prem Singh, 1995 Supp (4) SCC 252 and Subhash M. Gandhi v. L. Himingliana, (1994) 6 SCC 14 are not considered. He,

therefore, submitted that, 1998 decision in the case of Parasmal Rampuria is a decision per incuriam and per ignoratio and, therefore, may not be considered by this Court.

#. Mr. Mangukia submitted that the petitioner has made allegations about the mala fides and, therefore, in light of decision in the case of D.D. Suri v.A.K. Barren & Ors., AIR 1971 SC 175, at least the other side may be called upon to reply to the allegations. He also placed reliance on decision in the case of Express Newspapers Pvt. Ltd. v. Union of India, AIR 1986 SC 872 in support of this submission.

#. Having regard to contentions raised by Mr. Mangukia, before advertng to the facts of the case, the law governing such petitions may be, initially, looked into. As is settled in case of Additional Secretary to the Government of India & Ors. v. Smt. Alka Subhash Gadia and Another (Supra) and subsequent decisions in the case of Prem Singh (supra), N.K. Bapna (supra) and Subhash M. Gandhi (supra), there can be no dispute about the fact that, in case of prevention detentions, pre-execution petitions can be entertained by a Court. But, as is settled in case of Alka Subhash Gadia, the Court can entertain pre-execution petitions in five circumstances stated therein. Those circumstances are (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds, or (v) that the authority which passed it had no authority to do so, meaning thereby that in proper cases, the Court can interfere, but the scope would be necessarily very limited and the Court has to be prima facie satisfied about the grounds stated above.

7.1 Later on in case of Subhash Gandhi (supra), the Apex Court said that interference with detention order at pre-execution stage is limited to five contingencies mentioned in Alka Subhash Gadia's case or other contingencies of the same species. It is also to be borne in mind that, at this stage, the Court cannot entertain disputed questions of fact.

#. So far as question of law of precedent is concerned, as has been argued and has to be accepted that the decision of a Bench of three Judges has to be honoured as against the decision of a Bench of two Judges. In Commissioner of Sales Tax, J & K and Ors. v.

Pine Chemicals Ltd. and Ors., (1995) 1 SCC 58, relied upon by Mr. Mangukia, it has been held that decision of bench of three learned Judges is binding upon the bench of two learned Judges. In Union of India & Ors. v. Godfrey Philips India Ltd., (1985) 4 SCC 369, it has been held that a Bench of the Court cannot overrule or disapprove decision of another Bench of equal number of Judges and in case of disagreement, matter should be referred to a larger Bench. Thus, the Court would be bound by a decision rendered by larger number of Judges.

#. Now, advertng to the facts, it is not in dispute that no order under the PASA Act is passed at all and, therefore, this case is a case one step previous to the pre-execution stage in detention matters which have been referred to and relied upon by learned advocate for the petitioner. In fact, this is pre-order stage and not pre-execution stage and an attempt is made to assail something which non-existent by alleging mala fides and, therefore, in view of this Court, this petition is pre-mature. If there is no order, there is no question of a mala fide exercise of powers, as the power is not exercised at all. What is tried to be sought from this Court is a direction or order restraining the respondents from exercising powers under sub-section (2) of Section 3 of the PASA Act. The jurisdiction under Article 226 of the Constitution has to be exercised to supplement the legal process and any interference at this stage may cause hindrance to any action proposed. In the instant case, there does not appear any material to indicate passing of an order. The petitioner has, in clause (B) of paragraph 29, sought a writ, order or direction, quashing and setting aside the order passed by respondent No.2 and issued in purported exercise of powers under sub-section (2) of Section 3 of the PASA Act, as it is ex-facie arbitrary and mala fide, whereas, in fact, no such order is in existence and, therefore, the petition is not entertainable at all.

##. The Court may entertain a petition at a pre-execution stage if the facts indicate any of the contingencies indicated in Alka Gadia's case (supra) and may even issue notice to the other side to counter the allegations, provided some order is in existence, which is passed, allegedly, in mala fide exercise of powers. But when there is no order, there is no question of there being any mala fide exercise of powers and then there is no question of going further by asking for any explanation or counter to such allegations.

10.1 The decision relied upon by Mr. Mangukia in the

case of Express Newspapers Pvt. Ltd. (supra), if considered, indicates that, where mala fides are alleged, it is necessary that the person against whom such allegations are made should come forward with an answer refuting or denying such allegations. For otherwise such allegations remain unrebutted and the Court, in such cases, would be constrained to accept the allegations so remaining unrebutted and unanswered on the test of probability. It is not for the parties to say what is relevant or not. The matter is one for the Court to decide. In that very decision, it has been observed by the Apex Court that vague allegations of mala fides are not enough to dislodge the burden resting on the person who makes the same, though what is required in this connection is not a proof to the hilt. The abuse of authority must appear to be reasonably probable. Therefore, exercise of power is a condition precedent to indicate abuse of power or its mala fide exercise. Here, when there is no order passed, there is no question of any abuse of authority or mala fide exercise of powers and, therefore, the decision will not be of any help to the petitioner when he has approached this Court in absence of any order.

10.2 Likewise, in the case of D.D. Suri v. A.K. Barren (supra) also, there did exist an order which, according to the appellant before the Apex Court, was actuated by deepest malice and manifest mala fides. In the petition also, it was alleged that the order was purported to have been issued under the Rule which contemplated suspension pending disciplinary proceedings, but there was no proceedings, in fact, pending and, therefore, the order was altogether illegal. So, in that case also, the orders did exist unlike the present case and, therefore, this decision also will not help the petitioner.

##. Regarding Alka Subhash Gadia's case, there are five contingencies in which Court may entertain a pre-execution petition. Let us examine each of them one after the other:

(1) That the impugned order is not passed under the Act under which it is purported to have been passed. This indicates that what was contemplated by the Apex Court was an order in existence and not a pre-order situation.

(2) That order is sought to be executed against a wrong person. This means that the order must have been passed and sought to be executed unlike the present case

where there is no order.

(3) That order is passed for a wrong purpose. Here, order is passed, but may be with a wrong purpose. In the instant case, there is no order at all.

(4) That order is passed on vague, extraneous and irrelevant grounds. Here also, a situation that is contemplated is subsequent to passing of order and not before that, as is the fact in the present case.

(5) That the authority which passed it had no authority to do so. Here the order is not passed and, therefore, there is no question of an authority passing the order without jurisdiction or authority.

Even if the case of Subhash Gandhi (supra) is considered, there also, it is stated that interference with preventive detention at pre-execution stage is limited to five contingencies contemplated in Smt. Alka Subhash Gadia's case (which is not existing as demonstrated above) or other contingencies of the same species. Here also, there is nothing to indicate any such similar situation existing which may convince this Court to entertain this petition at this stage.

11.1 So far as entertaining a detention petition at a pre-execution stage is concerned, the decision in the case of Prem Singh (supra) makes it clear that, at pre-execution stage, challenge to detention order in a judicial review is permissible only on limited grounds enumerated in Alka Subhash Gadia's case. Such grounds could not be indicated by learned advocate for the petitioner during the course of arguments and the petition, therefore, cannot be entertained. In case of N.K. Bapna (supra) also, it was held that it is not necessary for the proposed detenu to wait till detention order is served upon him before challenging the detention order in case of preventive detention. However, the Court reiterated the grounds stated in the case of Alka Subhash Gadia for interfering in pre-execution matters in case of preventive detention. Thus, in Bapna's case also, the principles laid down in case of Alka Gadia (supra) are re-stated.

##. Reference was made to the case of Parasmal Rampuria (supra) by Mr. Mangukia, on apprehension that the said decision may come in his way. He submitted that this decision was rendered in facts of that case and, according to him, was a judgment per incuriam. However,



without entering into the larger questions, as discussed above, this Court is not inclined to entertain this petition, not on basis of case of Parasmal Rampuria, but for the reason that the petition is at a very pre-mature stage of pre-order situation and not after the passing of order at pre-execution stage. The allegation of mala fide or improper exercise of power cannot be accepted.

##. In this view of the matter, the petition does not merit admission. Barring a few allegations of the petitioner belonging to separate political party, other than the ruling party and ensuing elections, etc., and the alleged false involvement in the criminal cases, there is nothing to indicate real mala fides. The offences registered against the petitioner will take their proper course of investigation and trial and, at this stage, this Court will not make any observation on that count. What is required to be looked into by this Court, at this stage, whether there exists an order which, according to the petitioner, is an outcome of mala fides and improper exercise of powers, which is sought to be executed against the petitioner and which, in turn, is likely to cause irreparable prejudice to the petitioner. This having not been established, this petition cannot be entertained, at this stage, as has been held in the case of Alka Subhash Gadia (supra) and Subhash Gandhi (supra) that pre-execution petitions can be entertained in case of prevention detention only in circumstances prescribed in Alka Subhash Gadia's case and/or situation of same species. The petition is dismissed.

[ A.L. DAVE, J. ]

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